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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-1944

J. TRUETT PAYNE COMPANY, INC.,
a corporation,

Petitioner

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC.

AND

BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE

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MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC.

Vanco Beverage, Inc. ("Vanco") respectfully moves this Court for leave to file BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE, instanter. The grounds for Vanco's motion are stated below pursuant to Rule 36.3 of the Rules of the Supreme Court.

I. Respondent Has Refused to Consent

Pursuant to Rule 36.1 of the Rules of the Supreme Court, Vanco requested petitioner J. Truett Payne, Inc. ("Truett Payne") and respondent Chrysler Motors Corporation ("Chrysler") to consent to filing of an amicus curiae brief by Vanco in support of petitioner Truett Payne. Truett Payne consented. Chrysler refused to consent.

II. Interest of Vanco Beverage, Inc.

Vanco is interested in this case because it is the plaintiff in litigation which involves certain legal issues similar to those involved here. Vanco is an Indiana corporation engaged in beer distribution. Vanco and its competitors purchase beer from brewers and resell that beer to retailers. Vanco's complaint is based on secondary line price discrimination in violation of Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a). Vanco won a judgment after a bench trial before the Hon. Cale J. Holder, reported as *Vanco Beverage, Inc.* v. *Falls City Industries, Inc.*, 1980-2 CCH Trade Cases ¶ 63,357 (S.D. Ind. 1980). That judgment has been appealed to the United States Court of Appeals for the Seventh Circuit, docket no. 80-1709. The appeal has been fully briefed and has been set for oral argument on December 10, 1980.

The District Court, after finding that Vanco had lost profits and lost business as a result of illegal price discrimination, that it had absorbed much of the illegal overcharge and that the defendant's discriminatory prices were not set to meet competition, awarded Vanco damages in the amount of the overcharges, trebled. *Vanco Beverage, Inc.* v. *Falls City Industries, Inc., supra,* at page 75,821. On appeal, the defendant has argued that the overcharge may not be awarded to Vanco and that the damage award may only be measured by the amount of sales and profits that Vanco can

specifically demonstrate it lost as a result of the price discrimination found by the District Court.

The primary disputes in the case at bar are: 1) whether petitioner Truett Payne adequately proved that it was injured by illegal price discrimination, and 2) whether the overcharge is a proper measure of damages. Vanco is concerned with reaffirming that after price discrimination, probable injury to competition and fact of injury to the plaintiff have been demonstrated, the amount of the price discrimination may be a proper measure of damages in a secondary line Robinson-Patman Act case. This Court's decision in the instant case may reach that issue and thus affect Vanco's case on appeal. In addition, Vanco did not rely on an inference from the price discrimination to prove fact of injury, but established the injury by introducing substantial evidence in addition to the overcharge. Vanco supports petitioner Truett Payne's position that injury may be inferred from price discrimination between competitors or, in the alternative, from other circumstantial evidence, and that proof of specific lost sales and profits is not necessary to establish the fact of injury.

III. Questions of Law That Have Not Been Adequately Presented and Their Relevancy to the Disposition of This Case.

The Fifth Circuit's opinion in the case presently being reviewed states that both the fact of injury and the amount of damage must be established by substantial evidence of actual lost sales and profits. With regard to proof of fact of injury, the present case poses questions of whether sufficient evidence was presented to allow the case to go to the jury, including whether the jury could infer such injury from proof of the price discrimination. The Fifth Circuit

cast this issue in terms of an "automatic damages" concept. As is evident from Vanco's situation, however, it is not sufficient for this Court to decide simply whether or not injury may be inferred from a demonstrated price discrimination. Vanco established injury to itself from other kinds of evidence, including: (1) declines in its sales volume and profitability relative to its favored competitors and relative to similar businesses unaffected by the price discrimination; (2) advertisements by customers of the favored competitors soliciting business in Vanco's natural market area; and (3) surveys and direct evidence to show that consumers sought out the lower prices of customers of Vanco's favored competitors. It is Vanco's position that even if this Court were to conclude that an inference of injury to the plaintiff cannot be drawn from a substantial price discrimination, a finder of fact should still be allowed to conclude from other evidence that the plaintiff was injured even if it has not shown specific sales and lost profits. Because the dispute in the case being reviewed revolves around the "automatic damage" concept it is unlikely that either the petitioner or the respondent will fully explore the questions relating to what quantum and types of evidence the plaintiff may rely upon to demonstrate injury, nor does this case present this Court with a set of facts adequate to raise all of the relevant issues.

Even more important, in none of the cases cited by respondent have damages in the amount of the overcharge been denied after injury to the plaintiff was found, since in each of those cases it was held that no injury had been established. Similarly, in the case under review the issues of fact of injury and measure of damage are linked because the Fifth Circuit rejected the finding of injury. If that ruling stands, the ruling on the measure of damages is likely to

stand with it. Yet in Vanco's case, because the fact of injury was otherwise established, the question of whether the overcharge may be a reasonable estimate of the amount of damage presents a completely separate question, and one which will not be presented by the case being reviewed.

Trial and appellate courts will seek much-needed guidance from this Court's opinion in the present case to resolve the whole range of issues related to injury and damage in secondary-line Robinson-Patman Act discrimination cases. Because this Court's opinion will undoubtedly have an impact on the issue raised by Vanco's case but not squarely presented here, it is important to Vanco, to other litigants and to the other federal courts that this Court be presented with the fullest possible view of the issues.

Respectfully submitted,

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November 20, 1980

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STATEMENT OF INTEREST AND QUESTION PRESENTED

Vanco Beverage, Inc. ("Vanco") hereby incorporates by reference herein the Statement of Interest and Questions of Law That Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case set forth in paragraphs II and III, respectively, of its Motion for Leave to File Brief as Amicus Curiae which immediately precedes and is bound together with this Brief.

SUMMARY OF THE ARGUMENT

The case before this Court does not involve issues related to what is necessary to establish a violation of Section 2(a) of the Robinson-Patman Act, since the Fifth Circuit did not reject the jury's finding of a violation. *Chrysler Credit Corporation* v. *J. Truett Payne, Inc.*, 607 F.2d 1133, 1135 (5th Cir. 1979). The only questions presented are what proof a plaintiff must introduce to establish that it was injured by the violation and how the amount of damages resulting from that injury may be measured.

The language of many of the cases relied on by respondent at page 8 of its Brief in Opposition to the Petition for Writ of Certiorari (hereafter "Brief in Opposition") suggests that there is a dispute about how to prove both the fact of injury and the amount of damages in secondary line price discrimination cases. However, the primary dispute actually involves how an injury caused by illegal price discrimination may be proven. No case has been cited in which a court concluded that the fact of injury had been established but that the amount of the overcharge was an improper measure of damages.

The dispute over proof of injury arises out of what inferences are permissible once a violation of Section 2(a) has been proven. Vanco will argue that in appropriate circumstances the fact of injury may be inferred from the overcharge or from other circumstantial evidence, and that proof of specific lost sales and lost profits is not required. The dispute over measurement of damages, on the other hand, centers on when the amount of the price discrimination is an appropriate measure of damages. Vanco will argue that once the fact of damage has been established it is permissible to award the amount of the overcharge as minimal damages.

Unfortunately, the distinction between what is necessary to establish that the plaintiff has been injured in his busi-

ness or property by the defendant's Robinson-Patman Act violation and what is necessary to establish the appropriate amount of the damage award has been lost in many of the cases relied upon by respondent.

It is important that the broad language in these cases and in the Fifth Circuit's opinion on review here should not be construed to prevent a trial court from finding damages in the amount of the overcharge when the fact of injury has been established and the overcharge is a reasonable estimate of that damage.

Section I of this Brief reviews the historical development of the dispute over proof of injury and measurement of damages; Section II analyzes why the overcharge is a proper measure of damages once injury has been demonstrated; and Section III explains why it is proper to infer injury from price discrimination between competitors or from other circumstantial evidence.

ARGUMENT

I. Historical Review of Approaches to Proof of Fact of Injury and Reasonable Estimation of Damages in Secondary Line Robinson-Patman Act Cases.

The split of authority on standards for proof of injury and reasonable estimation of damages in secondary line Robinson-Patman Act cases began with the Second Circuit's decision in *Enterprise Industries, Inc.* v. *Texas Company*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (hereafter *"Enterprise"*). The genesis of the split can be traced to differences between the Second Circuit and the mainstream of authority on how the probable anticompetitive effect element of a Section 2(a) violation may be proven, which resulted in parallel differences in how injury can be proven and how damages may be measured. Analysis of how the split occurred must begin with a look at the two different approaches to proof of probable anticompetitive effect.

The majority approach originated in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948) (hereafter "*Morton Salt*"), and has been refined in subsequent Circuit Court cases. In *Morton Salt*, this Court said that probable anticompetitive effect is "self evident" when there is a substantial price differential between competitors (*Id.* at 50-51). A "substantial" price differential was defined as one large and persistent enough to influence resale prices (*Id.* at 47). Circuit Court cases following *Morton Salt* have refined when a price differential obviously had a potential for reducing competition. For example, *Bargain Car Wash, Inc.* v. *Standard Oil Company (Indiana)*, 466 F.2d 1163, 1174 (7th Cir. 1972), summarized the types of price differentials from which the inference of anticompetitive effect would be allowed: (a) a price differential that influences resale prices, (b) a substantial price differential that exists in the context of keen competition and tight profit margins, or (c) a substantial and sustained price differential between competing resellers.[1]

Appellate Courts have also articulated the corollary of the *Morton Salt* doctrine—that where the price differential is not obviously injurious the plaintiff must prove a causal connection between the price differential and a probable anticompetitive effect. For example, in *American Oil Company* v. *Federal Trade Commission*, 325 F.2d 101, 106 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964), a price differ-

[1] For leading decisions in other Circuits, see *Foremost Dairies, Inc.*, v. *Federal Trade Commission*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), *Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F.2d 674 (2d Cir), *cert. denied*, 361 U.S. 826 (1959), and *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, *reh. denied*, 356 U.S. 905 (1958). See generally 16 C Von Kalinowski, Business Organizations, Antitrust and Trade Regulation § 31.01[2] (hereafter "Von Kalinowski").

ential which occurred sporadically for brief periods did "not present that inherent capability of lessening competitive ability as was evidenced by the discriminatory system in *F.T.C.* v. *Morton Salt Co.*" See also *International Film Center, Inc.* v. *Graflex, Inc.*, 427 F.2d 334 (3d Cir. 1970), where no inference of anticompetitive effect was allowed because the price discrimination had occurred in only three transactions. When the *Morton Salt* doctrine has been applied and a probable anticompetitive effect has been inferred from an egregious price discrimination, it has been difficult for a defendant to rebut the inference that such a price discrimination is likely to have an anticompetive effect.[2]

The Second Circuit has expanded the *Morton Salt* doctrine, to allow a probable anticompetitive effect to be inferred from virtually *any* price differential. The causal connection between the price differential and probable anticompetitive effect is presumed, and it is the defendant's burden to prove that the price differential is not likely to have an anticompetitive effect. This approach was first applied in *Samuel H. Moss, Inc.* v. *Federal Trade Commission*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734, *reh. denied*, 326 U.S. 809 (1945) (hereafter "*Moss*"), and followed in *Federal Trade Commission* v. *Standard Brands, Inc.*, 189 F.2d 510, 515 (2d Cir. 1951), and *Enterprise, supra*, at 460. A good summary of the Second Circuit approach appears in *Sano Petroleum Corporation* v.

[2] See *National Dairy Products Corp.* v. *Federal Trade Commission*, 395 F.2d 517, 522 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968), where the court said injury may be inferred even if the favored customer does not undersell rivals, for a substantial price advantage can enlarge the favored buyer's profit margin or enable him to offer attractive services. See also *Moog Industries, Inc.* v. *Federal Trade Commission*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411, *reh. denied*, 356 U.S. 905 (1958). See generally 16C Von Kalinowski, *supra*, § 31.01[2][c].

American Oil Company, 187 F.Supp. 345, 353 (E.D.N.Y. 1960).[3]

Although it differs from this Court and virtually all other circuit courts by allowing the likelihood of an anticompetitive effect to be inferred from price differentials that are not obviously injurious, the Second Circuit has nevertheless imposed the same heavy burden on the defendant to rebut the inference as other courts have imposed in the context of flagrant price differentials. The *Enterprise* case, *supra,* is an example of such a heavy burden imposed in a situation where the injurious effect was neither obvious nor otherwise established.[4]

Thus, this Court and virtually all circuits other than the Second Circuit allow a probable anticompetitive effect to be inferred only from price differentials which are substantial and obviously injurious. When the price differential is not obviously injurious, the plaintiff must specifically demonstrate the likelihood of an anticompetitive effect. In the Second Circuit, however, the combination of doctrines inferring an anticompetitive effect from virtually any price discrimination and holding the defendant to a high standard

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[3] The Second Circuit interpreted *Morton Salt* as affirming its approach of inferring probable anticompetitive effect from any price differential because *Moss* was cited in *Morton Salt, supra* at 45, n. 13. *Federal Trade Commission* v. *Standard Brands, Inc., supra,* at 515. However, *Morton Salt* cited *Moss* for the proposition that the term "price discrimination" was a price differential between competing resellers. *Morton Salt* clearly limits the inference of probable anticompetitive effect to certain types of price discriminations, and does not approve drawing such an inference from all discriminations.

[4] See *Standard Motor Products, Inc.* v. *Federal Trade Commission,* 265 F.2d 674 (2d Cir.), *cert. denied,* 361 U.S. 826 (1959), for an example of the Second Circuit imposing a heavy burden of rebuttal in the context of a flagrant price discrimination.

to rebut such an inference means, as a practical matter, that a violation is made out whenever the plaintiff proves the jurisdictional elements of Section 2(a) and any price discrimination.

These differences between the Second Circuit and the mainstream of authority on how anticompetitive effect must be demonstrated have led to differences in what a private plaintiff must show to establish that it has been injured by the price discrimination. This Court has allowed the fact of injury to be inferred from the same facts used to prove or infer probable anticompetitive effect, *provided*: (a) the plaintiff proves that he is within the class of persons or is the person subject to the probable anticompetitive effect, and (b) extraordinary circumstances do not draw the inference into question.[5] If the probable anticompetitive effect has been inferred from substantial price discrimination or has been specifically proven when the discrimination is not obviously injurious, it is also appropriate to infer that persons subject to the anticompetitive effect have been injured. If the defendant demonstrates that extraordinary circumstances make it unlikely that the plain-

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[5] The probable anticompetitive effect element of Section 2(a) has also been called an "incipiency" element. Theoretically, there is a probable injurious effect if a discrimination might hurt competition in the future, but has not yet had that effect. As a practical matter, such incipiency is an extraordinary circumstance which could draw the inference into question. That can occur when discriminatory prices have just been put into effect, or when a favored purchaser and a disfavored purchaser who have not competed in the past are drawn into competition, perhaps through expansion of their market areas. When a sustained and substantial price differential between competitors has been in effect for a long period, it is highly unlikely that injurious effects are incipient and not actual.

Other extraordinary circumstances that could call the inference of injury into question are discussed *infra* at page 18.

tiff has been injured, then the burden shifts back to the plaintiff to prove that it has been injured.[6]

This Court's approach to how a reasonable estimate of damages may be established is similar to its approach on inferring injury. Once the fact of injury has been established, either by inference or from a further proof, it is presumed that damages amount to at least the overcharge absent extraordinary circumstances. That presumption is made because under commonly understood principles of economics, the overcharge is a direct business injury.[7] If the defendant has shown extraordinary circumstances which draw that presumption into question, then the plaintiff should specifically prove that the overcharge is a reasonable estimate of damages.

Most cases, however, have not distinguished between proof of fact of injury and a reasonable estimate of damages, because in those cases where injury was properly presumed from the price discrimination, it was also presumed that the damages were at least the amount of the overcharge. On the other hand, those decisions that have raised a question as to whether the overcharge was a reasonable estimate of damages have involved situations where the plaintiff was not injured at all by the price discrimination, so that it was unnecessary to reach the question of how damages should be measured.

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[6] The probable anticompetitive effect element of Section 2(a) is perceived as a "public injury" element. Theoretically, the plaintiff could prove that element by showing that a discrimination has an injurious effect on persons other than itself. That is why the plaintiff must show that it is within the class of persons or is the person subject to injury. See *Perkins* v. *Standard Oil Co. of California*, 395 U.S. 642 (1969).

[7] The public policy and economic bases of this presumption are discussed *infra* at pages 14-20.

An early opinion which recognized the overcharge as a direct damage is *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).[8] That case referred to the overcharge as an "unequal expense burden" which was "clearly a direct business damage". Then, in *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743, 747 (1946) (hereafter *"Bruce's Juices"*), this Court said that a plaintiff could recover the overcharge as damages without proving more than illegal price discrimination unless there were extraordinary circumstances. *Bruce's Juices* allows the fact of injury to be inferred from the same facts used to prove a probable anticompetitive effect, and allows the overcharge to be presumed as damages once the fact of injury is established. The implication is that if there are extraordinary circumstances, the fact of injury will not be inferred and damages will not be presumed.

Most circuits have followed the approach clearly articulated in *Bruce's Juices*. *Grace* v. *E. J. Kozin Company*, 538 F.2d 170, 174 (7th Cir. 1976); *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951) (hereafter *"Russellville"*). The *Russellville* case shows how the *Bruce's Juices* rule works when there are extraordinary circumstances which prevent an inference of fact of injury and presumed damages.[9]

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[8] This case involved a violation of Sections 2(d) and 2(e) of the Robinson-Patman Act, 15 U.S.C. 13(d) and (e), but this is immaterial because the requirement of showing injury and damages is the same for all sections of the Robinson-Patman Act. See note 12 *infra*.

[9] *Russellville* involved one of the first private damage actions based on a basing point price system similar to those that had been found to violate § 2(a) in *Corn Products Refining Co.* v. *Federal Trade Commission*, 324 U.S. 726

The Second Circuit, however, has promulgated a different approach. The Second Circuit has said that the fact of injury should not be inferred, but that injury and damages should be demonstrated as ascertained lost sales and lost profits. The Second Circuit's approach appears to be motivated by its standards of proof for probable anti-competitive effect. Since as a practical matter these standards mean that a violation is established when virtually any price discrimination is shown, a further inference of injury and presumed damages could rest on a very flimsy base in the Second Circuit.

Exactly that was the situation in *Enterprise, supra,* where the Second Circuit's approach originated. Although it is difficult to ascertain the facts underlying the *Enterprise* case from the Second Circuit opinion, a careful examination of that opinion and the district court opinion (136 F.Supp. 420 (D. Conn. 1955)) reveals that the plaintiff had complained of price advantages given to businesses with whom it did not compete for the bulk of its business, and that for the major part of its business not in competition with those "favored" businesses the peculiar nature of the price discrimination had left the plaintiff free to charge higher prices and reap higher profits than it otherwise would have. In another circuit, probable injury to competition would have been scrutinized and no violation found, because such probable injury was *de minimus.* The *Enterprise* court found a violation and the way was open to infer injury and presume damages. Rather than holding that the price discrimination did not have a probable anticompetitive effect or articulating the factors that showed that the plaintiff had not been injured, the *Enterprise* court stated that the plaintiff had

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(1945) and *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.,* 324 U.S. 746 (1945). The *Russellville* court found a violation, acknowledged the *Bruce's Juices* rule, but found exceptional circumstances which rebutted inference of injury and presumption of damages.

failed to prove fact of injury and amount of damages because it had not demonstrated lost sales and lost profits. Thus, the *Enterprise* case is properly understood as an attempt to compensate for the Second Circuit's overly liberal rules for establishing a Section 2(a) violation.[10]

Although the result reached in the *Enterprise* case is correct, the language of the opinion has resulted in a mischievous doctrine which may impose an unrealistic and unfair burden on plaintiffs where an anticompetitive effect has been inferred from an egregious price discrimination or has otherwise been established. In such a case, if the plaintiff is among the class of persons affected by the price discrimination, it is logical to infer that the plaintiff has been injured. When a substantial violation has thus been established, it is appropriate to place the burden of rebutting the inference of injury on the defendant.

The consequences of the Second Circuit's doctrine may have come to fruition in the case under review. In the present case the Fifth Circuit appears to have been even more stringent than *Enterprise* in its approach to proof of injury and measure of damages. The Fifth Circuit follows the Supreme Court's approach toward proof of probable anticompetitive effect. *Foremost Dairies, Inc.* v. *Federal Trade Commission,* 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965). However, in addition to the safeguards imposed by the *Morton Salt* approach to proof of a violation, the Fifth Circuit has now imposed the stringent *Enterprise* approach to proof of injury and measurement of damages. It imposed a heavy burden of proof of fact of injury, as is evident from its reversal of

[10] This is evident from the *Enterprise* court's comment that because the defendant already had a heavy burden to attempt to rebut the inference of a violation once a price discrimination is shown, it would be unfair to require the defendant to rebut the inference of injury and damages as well. *Enterprise, supra,* at 460.

both the jury verdict and the denial of the defendant's motion for a judgment notwithstanding the verdict. The Fifth Circuit also stated that the overcharge should not be recognized as a general damage.

The following sections explain why it is permissible to allow the overcharge as a reasonable estimate of damage, and why fact of injury should be inferred in appropriate situations.

II. A Damage Award in the Amount of the Overcharge is Permissible When the Fact of Injury Has Been Established.

Once a plaintiff has established that it was injured in its business or property by the defendant's price discrimination in violation of the Robinson-Patman Act, it is permissible for a court to find damage in the amount of the overcharge because a reasonable estimate of the amount of damage is all that is required of an antitrust plaintiff and the amount of the overcharge is a reasonable estimate of the minimum amount of damage. The arguments contrary to this proposition are incorrect or irrelevant.

Reasonable Estimate

It is well established that

> " 'the constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery' for a proven invasion of the plaintiff's right." *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265-66 (1946) (quoting *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931)).

See also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). In fact, the Fifth Circuit recognized in the case under review that all that was required was a showing of the "approximate amount" of damage. *Chrysler Credit Corporation* v. *J. Truett Payne Inc., supra,* at 1135.

Overcharge as a Reasonable Estimate

This Court recognized in *Bruce's Juices supra,* at 757, that in a Robinson-Patman Act price discrimination case an award in the amount of the overcharge is proper.[11]

Numerous other courts have also approved damages in the amount of the overcharge. *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., supra; Fowler Manufacturing Co.* v. *Gorlick, supra; Grace* v. *E.J. Kozin Company, supra; State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.,* 202 F.Supp. 768 (N.D. Ill. 1961).[12]

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[11] This statement cannot be dismissed as mere dictum, even though the narrow holding of *Bruce's Juices* was that a Robinson-Patman Act claim could not be asserted as an offset in defense to a contract action for money due. The quoted passage was important to the holding because the petitioner had asserted that the difficulty of proving damages in a separate Robinson-Patman Act case would leave it without redress. The Court's ruling that damages would be presumed upon a showing of a discriminatory price differential was an important element in its rejection of the petitioner's argument.

[12] The *Elizabeth Arden* case was brought under Sections 2(d) and 2(e) of the Robinson-Patman Act, *Grace* under Section 2(c) and *State Wholesale Grocers* under Section 2(d). In its Brief in Opposition respondent attempts to distinguish cases brought under Sections 2(d) and 2(e) (and also, presumably, 2(c)) on the ground that such cases do not require a demonstration of likelihood of competitive injury. This is irrelevant, since that requirement is an element of the offense, which the Fifth Circuit assumed to have been established. The issues presented, which involve how fact of injury and amount of damage may be established under Section 4 of the Clayton Act, are equally applicable to violations of other sections of the Robinson-Patman Act as they are to Section 2(a) violations. Moreover, the proof that is necessary to establish damages is at least as stringent as that required to show the liklihood of an anticompetitive effect.

The willingness of this Court and others to allow damages to be assessed in the amount of the overcharge is grounded in a recognition both of the practicalities of what a private antitrust plaintiff can reasonably be required to prove and of economic reality in the unique context of a Robinson-Patman Act violation.

The respondent implies that a Robinson-Patman Act plaintiff should be required to demonstrate specific lost sales and a specific amount of lost profits. Brief in Opposition at 16. Such a rule, which would require a plaintiff to prove what would have happened but for the defendant's violation, would reverse the appropriate burden of proof and would be virtually impossible for most plaintiffs to satisfy and most courts to apply. As this Court has recognized in a similar context,

> "A wide range of factors influence a company's pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more bouyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist's hypothetical model, is what effect a change in a company's price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised the prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable." *Hanover Shoe, Inc.* v.

United Shoe Machinery Corp., 392 U.S. 481, 492-493 (1968) (hereafter "*Hanover Shoe*").[13]

A brief synposis of the problems of proof presented by Vanco's case provides a vivid example of the concerns articulated by this Court in *Hanover Shoe*. Although the district court found that Vanco had lost both profits and sales because of the defendant's price discrimination, the calculation of how much of each were lost was difficult because Vanco had at times absorbed all or part of the discrimination in order to maintain competitive resale prices and at other times had maintained a profit margin that would allow it to be at least marginally profitable, which resulted in higher resale prices and consequent loss of volume. Further complications arose because the popularity of the defendant's brand of beer was generally declining[14] and Vanco had sought to compensate for the loss of its volume of the defendant's beer by purchasing the right to distribute other brands of beer as well. In addition, although Vanco established that its going concern value declined

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[13] See also *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 741-746 (1977). Plaintiffs would no doubt continue to try to establish specific damage, which would result in the kind of 2000-page record on the single issue of injury which was deplored by this Court in *Morton Salt, supra,* at 50.

[14] Vanco showed, in addition to other evidence, that some of its loss of volume was attributable to the price discrimination rather than to the declining popularity of defendant's beer by comparing the relative rate of decline in its sales to those of its competitors favored by the price discrimination and to those of noncompeting distributors of the defendant's beer who were not affected by the price discrimination.

The substantial nature of the price discrimination in Vanco's case is shown by the District Court's holding that over the six year period in question the discrimination against Vanco ranged from 9.69% to 29.2%. *Vanco Beverage, Inc.* v. *Falls City Industries, Inc., supra,* at page 75,814.

substantially during the years in question, an indeterminable part of this decline may have been due to a recapitalization and to changes in corporate policy. To require a plaintiff like Vanco to prove specific lost sales and lost profits would both unfairly disadvantage it and would also severely undercut the private damage remedy in Robinson-Patman Act cases and the public policy it serves.[15]

Equally important, as a matter of economic reality the amount of the overcharge is a reasonable estimate of the plaintiff's minimum damages in the unique context of a Robinson-Patman Act case. Once a plaintiff has demonstrated that it was illegally discriminated against *vis-a-vis* its competitors and also that it was injured by such price discrimination, it is reasonable to measure that injury by the amount of the price discrimination because of the very nature of the competitive relationship. In a simple model case with only two possible responses, where a defendant raises its price to the plaintiff but not the plaintiff's competitors, or reduces its price to the plaintiff's competitors but not to the plaintiff, the plaintiff must either raise its resale price to maintain the same profit margin as its competitors or maintain the same resale price as its competitors but retain a smaller profit margin. If the plaintiff chooses the latter course and its competitors are generally maintaining profit margins that provide a "normal" return on equity, the plaintiff will have been injured in the amount of its decreased profit caused by its absorption of the price discrimination, *i.e.*, in the amount of the price discrimina-

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[15] Although the Robinson-Patman Act has been the target of much criticism by members of the antitrust bar, properly applied it reinforces the other antitrust laws and promotes competition and economic efficiency. See note 29, *infra*. In any event, so long as the statute is on the books it is the obligation of the judicial branch to see that it is effectively and even-handedly enforced.

tion.[16] If the plaintiff chooses to pass the price discrimination on to its customers via higher prices than are charged by its competitors, a fundamental law of economics is that the plaintiff will lose sales to those competitors.[17] The calculation of damages will then be complicated by a necessarily speculative projection of lost volume based on elasticity of demand and consumer price sensitivity and on the plaintiff's marginal profit rate.[18] It is entirely possible that these damages could exceed the amount of the overcharge, or that the loss in the going concern value of the business could exceed the amount of the overcharge. If the plaintiff can prove such damages, it should be allowed to collect them.

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[16] It has been argued that if the plaintiff's competitors maintain the same resale prices as the plaintiff by increasing their profit margins so that the plaintiff still earns a "normal" profit, the plaintiff has not been "injured" by the price discrimination even though his competitors may have reaped a windfall. M. Handler, Twenty-Five Years of Antitrust, v. 2 (1973) p. 898 (hereafter "Twenty-Five Years"). As will be discussed *infra* (pp. 24-25), in the competitive context an unfair advantage of this sort to the plaintiff's competitor is an injury to the plaintiff even if it is able to maintain a "normal" profit on the item involved in the price discrimination.

[17] In the real world a disadvantaged competitor is unlikely to take either of these extreme positions, but instead will pass through a part of the price discrimination and absorb the rest, with the amount passed through and the amount absorbed varying over time. Moreover, the plaintiff's competitors presumably will react to the plaintiff's actions by altering their pricing, advertising and other business decisions, in a continuous interaction with the plaintiff's policies that probably defies the ability of currently available tools of economic analysis to unravel and reconstruct.

[18] Even if the application of sophisticated techniques of economic analysis to the type of data reasonably available made it theoretically possible to arrive at a reliable calcu-

It is also theoretically possible for the plaintiff to pass through the entire amount of the overcharge and nevertheless to sustain no damages from lost volume, or to sustain damages which are substantially less than the overcharge. This could occur, for example, if: (1) the greater part of the plaintiff's sales were not in competition with the favored competitors, (2) there were countervailing advantages to the plaintiff from the price discrimination which offset the damages in whole or in part, or (3) the demand for the product sold by the plaintiff and its competitors was extremely inelastic and its purchasers insentitive to price (the paradigm case being a cost-plus contract). Vanco submits that these are the sort of extraordinary circumstances, recognized by this Court in *Bruce's Juices* and *Hanover Shoe,* both *supra,* in which the amount of the discrimination is not a proper measure of damage. However, the burden should be on the defendant to establish such extraordinary circumstances, both because they *are* extraordinary and because otherwise the plaintiff would bear the nearly insuperable burden of proving a negative. Further, the complex evidence the plaintiff would be compelled to introduce in an attempt to demonstrate the precise effect of the overcharge (which the defendant would no doubt seek to rebut with

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lation of lost profits and lost sales and the effect of these on the plaintiff's business, the process of doing so would put an intolerable burden on trial courts. As this Court has recently recognized,

> "In view of the difficulties that have been encountered, even in informal adversary proceedings, with the statistical techniques used to estimate these [elasticity] concepts, it is unrealistic to think that elasticity studies introduced by expert witnesses will resolve the pass-on issue. . . . [A]ttention to 'sound laws of economics' can only heighten the awareness of the difficulties and uncertainties involved in determining how the relevant market variable would have behaved had there been no overcharge." *Illinois Brick Co.* v. *Illinois,* 431 U.S. 720, 742-743 (1977) (citation omitted).

equally complex calculations) would be an unnecessary imposition on already overburdened trial courts. Vanco also submits that a careful analysis of the facts as reported in the district and appellate decisions in *Enterprise* and *Russellville,* both *supra,* reveals that the first and second of these extraordinary factors were present in the *Enterprise* case, and that the second and third were present in *Russellville.* If a defendant can establish that a plaintiff was not injured in at least the amount of the overcharge, of course that amount should not be awarded.

In the usual case, however, neither party will be able to establish the exact amount of damage for the reasons articulated by this Court in the *Hanover Shoe* case, *supra.* In such a case, the plaintiff's inability to prove specific lost sales and lost profits should clearly not defeat its right to recompense for the injury it has demonstrated from the defendant's violation of law. The amount of the overcharge is a reasonable approximation of the damages suffered because it is no more than the amount the plaintiff would have been damaged if it had absorbed the whole price discrimination[19] and it is the amount by which

[19] The amount of the overcharge will not, in absence of exceptional circumstances, exceed the amount by which the plaintiff would have been damaged if it had absorbed the entire discrimination and maintained resale prices competitive with those of its favored competitors. In that case, the plaintiff would have sold X units and its damage would properly be measured as the amount of the discrimination ("D"), times its volume, or DX. If, however, the plaintiff passed through some of the discrimination in the form of higher prices, it must be assumed (in the absence of exceptional circumstances) that the plaintiff lost some sales, so that its volume was not X, but X-Y. Damages based on the overcharge are calculated on the plaintiff's actual, reduced volume and are therefore less than what the plaintiff would have been awarded if it had absorbed the entire discrimination. These damages can be expressed as D(X-Y).

the plaintiff would demonstrably have been better off and his business stronger but for the price discrimination.[20]

The economic truism that a plaintiff has been damaged at least in the amount it is out-of-pocket because of an antitrust violation was recognized by this Court in the *Hanover Shoe* case, *supra* at 490 "A person whose property is diminished by a payment of money wrongfully induced is injured in his property." The same principle has been widely applied in Robinson-Patman Act cases, as the cases cited at page 13 *supra* demonstrate. As Chief Judge Campbell put succinctly in *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co., supra*, at 774:

> "[T]he non-favored customer has in fact been damaged, in the absence of proof of other damages, to the extent of the [discrimination]. As a result of the violation, the non-favored customer is left with less in its treasury—less in profits, less to carry on its business, or less to keep in reserve. The non-favored customer has less money than he would otherwise have and, therefore, has been damaged."

Principles Cited to the Contrary Are Unpersuasive.

The decisions that have purported to deny damages measured by the amount of the overcharge[21] have mentioned two theories relating to the measure of damages, neither of which is persuasive. Moreover, the leading cases cited for the principle that such damages are inappropriate

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[20] This is not, of course, to suggest that the plaintiff must prove that it absorbed the whole amount of the discrimination. The point is that to allow the amount of the overcharge as damages will result in a smaller recovery for the plaintiff if he did pass through some of the overcharge, resulting in some loss of volume, than if he had absorbed the whole amount.

[21] All of these decisions, as indicated *supra*, arose in the context of denying any damages because no *fact* of injury had been established.

reveal the exceptional circumstances under which, Vanco would agree, such damages are inappropriate.

First, some decisions have borrowed a principle from Interstate Commerce Commission ("ICC") rate discrimination cases, to the effect that if a plaintiff establishes an illegal overcharge, it is entitled to be reimbursed in the amount of the overcharge, but if it establishes merely that a legal rate results in a discrimination against it, the plaintiff may recover only the amount by which it was damaged. *Interstate Commerce Commission* v. *United States ex rel Campbell,* 289 U.S. 385 (1933). Some courts have sought to analogize Sherman Act violations, in which this Court has unequivocally held that the plaintiff is entitled to damages in the amount of the overcharge,[22] to the ICC illegal overcharge cases. A Robinson-Patman Act violation is, according to this theory, more like a legal but discriminatory ICC rate case, so that the plaintiff must show specifically how it was damaged.

The attempted analogy is unpersuasive for at least three reasons. First, the semantic quibble over whether a Robinson-Patman Act price discrimination results in an "overcharge" to the plaintiff or merely a discrimination between it and its competitors is irrelevant in the realties of the competitive marketplace, as discussed *infra* at note 28. Second, unlike a freight rate, there is nothing inherently illegal about any price. A price is illegal only if it has been proven to be in violation of the antitrust laws. If it has been so proven, it is equally illegal regardless of whether the reason for the illegality is that the price resulted from price fixing or that the price is discriminatory between competitors. Third, and most fundamentally, rates in ICC cases have been administratively established and bear a strong presumption of validity.[23] A principle derived from this

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[22] *Hanover Shoe, supra.*

[23] An "illegal overcharge" in this context is a rate in excess of that approved by the ICC. A legal, but discrimina-

unique line of cases should not be superimposed on antitrust cases, especially where this Court has already stated, in *Bruce's Juices, supra,* that inferring damages in the amount of the overcharge is permissible in Robinson-Patman Act cases, just as it is in Sherman Act cases.[24]

A second reason mentioned in some decisions for not assessing damages in the amount of the overcharge involves the use of negative legislative history. A proposed section of the Robinson-Patman Act, which would have directed presumed damages to be assessed in every Robinson-Patman Act case in the amount of the discrimination, was omitted from the final bill. The deletion of this proposal, however, demonstrates nothing. It is completely consistent with a Congressional belief that the proposed language would have been redundant, since the general rules of damages would reach the same result. Also, Congress may have recognized that in the exceptional circumstances discussed above, an inference of damages in the amount of the discrimination should not be mandated. Speculating on why Congress did not enact proposed legislation is usually fruitless. Such an attempt is particularly inappropriate where the restrictive theory of damages which it seeks to justify was rejected by this Court in *Bruce's Juices, supra,* years after the legislative inaction on which the speculation is based.

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tory rate is one which has been approved by the ICC but which a shipper seeks to show results in a discrimination against it. As was recognized in *Enterprise, supra,* and further explained in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co., supra,* in that situation to award the shipper the amount of the discrimination, without more, could result in an unlawful rebate.

[24] It should also be recognized that the leading case of this line, *Interstate Commerce Commission* v. *U.S. ex rel Campbell, supra,* held merely that an Interstate Commerce Commission decision that damages should not be awarded entailed a discretionary judgment and therefore could not be the subject of a writ of mandamus.

Finally, as previously indicated, a careful reading of the facts involved in *Enterprise* and *Russellville,* both *supra,* suggests that both cases involved exceptional circumstances of the sort described at page 18 *supra,*[25] so that there was in fact no injury in spite of the price discrimination.[26]

Thus, neither the principles nor the cases relied upon by the respondent present persuasive reasons to abandon the principle that in an appropriate case where injury has been established, the amount of the overcharge may provide a reasonable estimate of the damage. Allowing an inference of damage in this amount is not unfair to the defendant, since it is usually the minimal amount of damage the plaintiff will have suffered. Moreover the defendant, which has been found to be an antitrust law violator, can rebut the inference in appropriate circumstances.

III. It Is Permissible to Infer the Injury from Other Factors.

After a plaintiff has clearly established that the defendant violated the Robinson-Patman Act, it still must show that it suffered an injury as a result of that violation, in order to be entitled to damages under Section 4 of the Clayton Act. For the same reasons discussed at length above (pp. 14-16), it will often be impossible for a plaintiff who

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[25] The other cases cited by respondent may well also have involved such exceptional circumstances, although the opinions do not so indicate.

[26] The *Russellville* court clearly articulated this basis for its decision.

> "We do not doubt that, ordinarily, where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages, but we think that this is not so here." *Russellville, supra,* at 55.

It is particularly unfortunate that the *Enterprise* court did not articulate this reason, but instead announced broad dicta which may have misled later courts.

has suffered price discrimination to demonstrate its injury by showing specific lost sales and a specific amount of decreased profits. It is Vanco's belief that in such a situation it is permissible to infer injury from the existence of the price discrimination in the competitive context, especially if the discrimination is substantial and sustained. If this Court disapproves of such inferences, a plaintiff should be allowed to establish injury through circumstantial evidence, without having to show specific lost sales and profits.

An Inference Is Permissible

To prove a Robinson-Patman Act violation, the plaintiff must establish that it has been discriminated against *vis-a-vis* its *competitors* and that this price discrimination may have an adverse effect on competition. In such a context it is entirely appropriate to infer that a plaintiff was injured by the proven unfair advantage of its competitors. This Court recognized the propriety of such an inference in *Bruce's Juices, supra*, as have the other courts cited on p. 9, *supra*.

It has nevertheless been argued that a showing that a plaintiff would have been better off but for the defendant's antitrust violation is insufficient to demonstrate the injury to business or property necessary to recover damages under Section 4 of the Clayton Act.[27] The theory goes as follows: If the plaintiff's competitors receive a discriminatory decrease in price but do not reduce their resale price, the plaintiff has not been harmed, although the competitors may be reaping extra profits.[28] Clearly, however, the plaintiff has been harmed, because he has been denied the oppor-

[27] M. Handler, Twenty-Five Years, *supra* note 16, at 898.

[28] M. Handler, *Id.* Although Mr. Handler insists that the Robinson-Patman Act requires a discriminatory "undercharge" to the plaintiff's competitors rather than an "overcharge" to the plaintiff, the hypothetical in the text above reveals that in the context of discriminatory prices charged

tunity, which his competitors enjoy, of maintaining the same profit margin while reducing prices, thereby increasing volume and total profits. Moreover, the plaintiff's competitors have increased profits resulting from their lower costs which may be used to strengthen the financial or capital base of their businesses or to enhance their competitive position through, for example, increased advertising, services, diversification or integration. Most importantly, the consequence of this "no injury" theory is to allow higher resale prices than would have resulted from competition on an equal basis, since by the theory's own logic the reason there will be "no injury" to the plaintiff is that its competitors are reaping windfall profits.[29] Not only is the plaintiff injured in such a situation, but so are consumers and the integrity of the competitive system which the antitrust laws were designed to protect.[30]

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competitors the overcharge-undercharge distinction is irrelevant. The effect of the example in the text would be precisely the same if the defendant instituted a discriminatory price increase to the plaintiff, causing it to raise its resale prices, if those higher prices were followed by its competitors.

[29] Another possibility is that the plaintiff and its competitors are making approximately the same profit not withstanding the price discrimination because the plaintiff is more efficient. In this situation the effect of the price discrimination will be to advantage the inefficient competitors, making them more likely to survive competition from more efficient firms and to weather economic downturns. Courts and commentators have recognized in other contexts that an application of the antitrust cases that favors inefficient firms is socially counterproductive and has a deleterious effect on the market. *Janich Bros., Inc.* v. *American Distilling Co.*, 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); Areeda & Turner, Predatory Pricing and Related Practices under Section 2 of Sherman Act, 88 Harv. L. Rev. 697 (1975).

[30] The Robinson-Patman Act fosters efficiency through protecting equality of competitive opportunity. (*Continued.*)

Courts have recognized the logic of the foregoing analysis:

> "It is not necessary that a price advantage be used to lower the resale price and thereby attract business away from the nonfavored competitors. Sales are not the sole indicium that reflects the health of the competitive scene. *E. Edelmann & Co.* v. *Federal Trade Commission,* 239 F.2d 152,155 (7th Cir. 1956), *cert. denied,* 355 U.S. 941, *reh. denied,* 356 U.S. 905 (1958). (See also cases cited therein.)

If this Court is unwilling to allow an inference of injury from the existence of price discrimination between competitors, it should nevertheless allow such an inference where the plaintiff has established that the price discrimination was substantial and sustained, affected the resale price or occurred in the context of keen competition or narrow profit margins. *Morton Salt; Bargain Car Wash, Inc.* v. *Standard Oil Co. (Indiana); Foremost Dairies, Inc.* v. *Federal Trade Commission; E. Edelmann & Company* v. *Federal Trade Commission,* all *supra.*

Circumstantial Evidence

A plaintiff should, in any event, be allowed to prove injury from other circumstantial evidence. Vanco, for example, showed declines in sales volumes and profitability relative to its favored competitors and relative to similar businesses unaffected by the price discrimination. Vanco introduced advertisements by customers of favored com-

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> "[I]f the law preserves a society of numerous businesses, the pressures imposed by their competitive interaction will spur firms to lower costs and to become more efficient and will reduce the chances of interdependent high pricing in the industry." American Bar Association Section of Antitrust Law, Monograph 4, vol. 1, The Robinson-Patman Act: Policy and Law (1980), p. 24.

See also *Standard Motor Products, Inc.* v. *Federal Trade Commission, supra,* at 676-677.

petitors soliciting business in the natural market area of Vanco's customers and quoting lower prices. Vanco submitted surveys and direct evidence to show that consumers sought out the lower prices of customers of its competitors. A finder of fact should be allowed to infer from this type of evidence that injury occurred. Defendants who have already been found to have violated the Robinson-Patman Act should not be allowed to escape liability by imposing on plaintiffs a standard of proof of injury that is unreasonably strict.

Contrary Arguments Unpersuasive

The reasons usually advanced by Robinson-Patman Act defendants for not allowing an inference of injury from one or more of the factors discussed above are unpersuasive. First, it is said the plaintiff may not have been injured at all because it may have "passed through" the price discrimination to its customers with no loss of volume. As discussed above,[31] in the competitive context this would truly be an extraordinary circumstance, and one that the defendant should be required to prove.[32] Moreover, this argument is tantamount to raising a "passing on" defense, which the Court repudiated in *Hanover Shoe, supra,* at 489 (emphasis supplied):

> "[W]hen a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of Section 4. . . . *We hold that the buyer is equally entitled to damages if he raises the price for his own product.* As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the

[31] See discussion at pages 16-19, *supra.*

[32] As noted at pages 10, 19 and 23, *supra,* it appears that the defendants in *Russellville* and *Enterprise,* both *supra,* may have succeeded in making such a showing.

buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.[33]

The holding of *Hanover Shoe* was recently reaffirmed in *Illinois Brick Co.* v. *Illinois, supra.*[34]

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[33] In some earlier cases, the argument was advanced that although "passing-on" was not a defense if the plaintiff was a "consumer" (i.e., used the product in a manufacturing process), it was a defense if the plaintiff was a "middleman" (i.e., resold the product without substantial alteration). Any attempt to maintain such a distinction was defeated in *Illinois Brick Co.* v. *Illinois, supra*, at 735 and n. 15.

Although both the *Hanover Shoe* and *Illinois Brick* cases, both *supra*, involved Sherman Act violations, their holdings are not limited to that context. Both decisions refer consistently to damages under Section 4 of the Clayton Act, which provides the remedy for all antitrust violations: neither decision intimates that its holding is confined to Sherman Act violations: and the reasons articulated for the holdings apply as well to Robinson-Patman Act violations as to Sherman Act violations. Moreover the same principle had earlier been applied in *Bruce's Juices, supra*, which was a Robinson-Patman Act case.

[34] Mr. Handler has approved the *Illinois Brick* decision, which favors defendants, without acknowledging that its logic is inconsistent with the thesis he has developed to avoid the inference of injury in Robinson-Patman Act cases. Handler, *Changing Trends in Antitrust Doctrine; An Unprecedented Supreme Court Term—1977*, 1977 Colum. L. Rev. 979 (hereafter *"Changing Trends"*). Indeed, the *Enterprise* decision and its progeny have resulted largely from the efforts of Mr. Handler, a well-known antitrust defense lawyer. He defended the Texaco Company in *Enterprise* and has subsequently repeatedly praised that decision and criticized conflicting ones in his writings and in his annual review of antitrust developments for the Association of the Bar of the City of New York. M. Handler, Twenty-Five Years, *supra*, note 16; Handler, *Changing Trends, supra.* His client, the Texaco Company, was the defendant in no fewer than four of the cases cited by the respondent as following *Enterprise*. His law firm, Kaye, Scholer, Fierman,

A second argument sometimes advanced against allowing an inference of injury is that somehow such an inference does not establish the requisite causal connection. It is customary to buttress this argument with citations to *Perkins* v. *Standard Oil Co. of California* 395 U.S. 642 (1969), and *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), both of which are irrelevant. The *Perkins* case involved an attempt by the defendant to avoid Robinson-Patman Act liability by introducing a straw middleman so that the discriminatory sales technically occurred at different levels in the distribution chain. The *Brunswick* case involved an attempt by the plaintiffs to use the defendant's antitrust violation as an occasion to gain an advantage even though the only "injury" they suffered was from the defendant's continued competition, not from its illegal behavior.[35] Defendants apparently attempt to read the *Perkins* and *Brunswick* decisions to say that causality cannot be inferred, but must be specifically proved. These cases clearly do not stand for any such proposition.

Hays and Handler, was recently counsel for Texaco in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F.Supp. 243 (E.D. Pa. 1979), a far-reaching opinion that contains many careless errors. Among these are the citation of irrelevant cases (478 F.Supp. at 275, n. 69) and the erroneous statement that *Fowler, supra,* which is contrary to *Enterprise,* was decided ten years before *Enterprise,* when in fact the opposite is true. *Id.* This error is significant in light of the Supreme Court's denial of certiorari in *Fowler.* Thus the cases following *Enterprise* are largely the result of a successful campaign by a special interest group.

[35] This Court rejected the plaintiff's theory in *Brunswick,* explaining that the *type* of injury suffered by the plaintiff must be the type that would be expected from the nature of the violation. Clearly, lost profits and sales and the inability to compete effectively with the favored competitors are precisely the type of injury to be expected from a Robinson-Patman Act violation.

Perkins and *Brunswick* can also be viewed as turning on whether the plaintiffs were within the class of persons injured by the defendant's violation.

CONCLUSION

For the reasons discussed above, Vanco Beverage, Inc. respectfully urges this Court:

(1) to recognize that when a plaintiff has established that it has been injured by price discrimination in violation of the Robinson-Patman Act but is unable to prove damages in a greater amount, a court may award the amount of the overcharge as damages unless the defendant demonstrates that the actual damages were less; and

(2) to reaffirm the standard of proof of injury established in *Bruce's Juices* so that all reasonable inferences from the facts and circumstances will be allowed and plaintiffs will not be required to show specific lost sales or profits to prove they were injured.

Respectfully submitted,

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November 20, 1980

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CERTIFICATE OF SERVICE

John T. Cusack certifies that he is a member of the Bar of this Court and that he caused the attached MOTION BY VANCO BEVERAGE, INC. FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER J. TRUETT PAYNE, INC. AND BRIEF OF VANCO BEVERAGE, INC. AS AMICUS CURIAE to be served upon Morris K. Sirote, at Sirote, Permutt, Friend, Friedman, Held & Apolinski, P.A., 222 Arlington Avenue South, Birmingham, Alabama 35205, and upon J. Frederic Ingram at Thomas, Taliaferro, Forman, Burr & Murray, 1600 Bank for Savings Building, Birmingham, Alabama, 35203, and Howard Adler, Jr., counsel for Falls City Industries, Inc., at Bergson, Borkland, Margolis & Adler, 11 Dupont Circle, N.W., Washington, D.C. 20036, by sending them the requisite number of copies through Federal Express Corporation's one day express service on November 20, 1980.

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John T. Cusack